

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

In the
UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

Case No. 77-4057

and Consolidated Case Nos.
77-4067, 77-4068, 77-4073,
77-4074, and 77-4075

PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER
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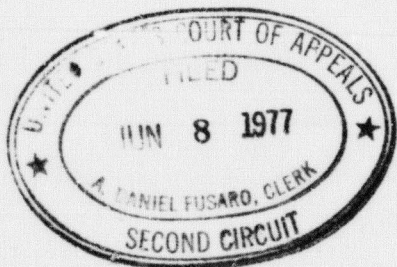
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REPLY BRIEF FOR PETITIONER
UNITED SYSTEM SERVICE, INC.

I.

In their Brief Counsel for Respondent FCC have attributed to the Commission findings and conclusions that the Commission did not make.

Counsel for Respondent FCC in their Brief cannot substitute their interpretation of the Commission's holdings and conclusions for that of the Commission when, as here, such interpretation is contradicted by the plain and unambiguous language of the Commission's Orders. For example, the FCC's Brief defines the issue in this proceeding as it relates to sharing as being:

whether the Commission acted arbitrarily, capriciously, contrary to law, or beyond its authority in determining...that true sharing does not constitute common carriage subject to Title II regulation, because it does not involve an undertaking for hire to serve the public indiscriminately. (FCC Br., p. 3) (Emphasis added.)

Subsequently, in the FCC's Brief it is also stated:

The FCC determined that customers sharing services-- either by joint use or through non-profit intermediaries-- were not engaged in common carriage, because there was no undertaking to serve the public indiscriminately. (FCC Br., p. 22)

Examination of the Commission's Order reveals that the Commission never found that entities engaging in sharing arrangements were not common carriers on the basis that they were not "undertaking for hire to serve the public indiscriminately." While we submit that this is

the test for common carriage that the Commission should have used, it is not the test that the Commission chose to use. Instead, its decision not to regulate entities engaging in sharing arrangements was based solely on the finding that "...sharing does not constitute the offering of a service by one entity to others for a profit. ..." 60 F.C.C.2d 261, 265 (J.A.,p.33)(Emphasis added.)

Moreover, the question of "holding out to provide service for hire to the public indifferently" cited in the FCC's Brief as being the test of common carriage every time (FCC Br., p. 53) was held by the Commission to be of significance only when and if an entity engaging in a sharing arrangement sought to make a profit from such sharing arrangements. See, for example, that portion of the Commission's Report and Order wherein it was held:

...once an element of profit enters into an arrangement otherwise characterized as sharing, we will consider whether Title II jurisdiction is required. We base this position not merely upon the presence of profit. Rather, we look to the substantial likelihood of an indiscriminate offering to the public once one sharer seeks to engage in a profit-making activity." 60 F.C.C.2d 261, 371 (J.A., p. 102). (Emphasis added.)

As is apparent from the above, the characterization by Counsel for Respondent FCC as to what the Commission held in its Orders with respect to sharing and the bases thereof does not comport with the actual holdings of the Commission. Counsel in their Brief to the Court cannot provide a rationale that the Commission failed to provide or otherwise followed in its Orders.

While the FCC's Brief does state the correct test for common carriage; namely, an undertaking to carry for hire all people indifferently, (FCC Br., p. 48), the fact remains that this is not the test that the FCC applied to determine whether entities engaging in sharing arrangements or resellers were common carriers. Instead, the Commission applied one test and one test only to determine if common carriage existed with respect to the envisioned activities of resellers and entities engaging in sharing arrangements. That test was the test of profit. 60 F.C.C.2d 261, 265, 317 (J.A., pp. 33, 102). Under the Communications Act, the Commission's own regulations, and existing case law, the question of profit is not part of the test of common carrier status. 47 U.S.C. § 153 (h); 47 C.F.R. § 21.2 (1976); NARUC v. FCC, 525 F.2d 630, 641 (D.C.Cir. 1976); NARUC v. FCC, 533 F.2d 601 (D.C. Cir. 1976).

It is well-settled that a common carrier is such by virtue of his occupation -- not because of legislative fiat, his charter, or because his state of incorporation considers him such. Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 211 - 212 (1927); United States v. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304 (1919). So long as there is a public holding out to carry for hire indifferently, an entity is a common carrier. The statutory requirement of the Communications Act that the service be "for hire," 47 U.S.C. § 153 (h), cannot be equated with "for profit."

"For hire" contemplates that the person providing the communication service do so for compensation or remuneration rather than gratuitously. We submit that a person could provide a communications service "for hire" to the public and still not make a "profit" from the provision of such service. The absence of profit from such an offering, however, does not change the fact that there has been a "holding out to provide service for hire indifferently to the public;" i.e., common carriage.

In determining whether entities engaging in sharing arrangements or resellers were common carriers, the FCC was required to apply the above test of common carriage. That it failed to do and, instead, changed the statutory definition of common carriers so as to include only those who make a profit from providing communications services (resellers) and to exclude those entities who do not (those engaged in sharing arrangements). Hence, profit was not simply a "useful tool" for determining common carriage (FCC Br., p. 53); profit was the only "tool" used by the Commission. The Commission's failure to enforce the law does not change it. Louisville & N. R. F v. United States, 282 U.S. 740, 759 (1931).

While, as discussed above, the FCC's Brief simply characterizes profit as being a "useful tool" in determining the existence or non-existence of common carriage (FCC Br., p. 53), some intervenors argue

that profit is, in fact, a proper jurisdictional criteria and that the Commission has so held.^{1/} Accordingly, it is argued, the FCC's views on this matter are entitled to great deference. (SIAC Intervenor Br., pp. 17 - 18; Arinc-Air Transport Intervenor Br., pp. 8 - 9). Insofar as these cases are concerned, it is important to note that none has been subject to judicial scrutiny. Moreover, an analysis of the cited cases indicates: (1) the sharing entities were all Commission licensees subject to regulation by the FCC under Title III of the Act, and (2) more importantly, the FCC never held in these cases, as it did in its Orders here on review, that profit is the threshold test of common carriage.

Various parties, other than the FCC, have challenged United's reliance on the recent decision of the United States Court of Appeals for the District of Columbia Circuit in NARUC v. FCC, 525 F2d 630 (1976), as setting forth the proper test of common carriage. For example, Intervenor SIAC argues that the Court emphasized "attributes" of common carrier status other than "the holding out to carry for hire all people indifferently" because profit was already assumed by the Court. (SIAC Intervenor Br., pp. 19 - 20). Intervenor Arinc-Air Transport also makes this argument. (Arinc - Air

^{1/} Cases cited as support for this proposition are ARINC v. AT&T, 4 F.C.C. 155 (1937); General Mobile Radio Service, 13 F.C.C. 1190 (1949); Cooperative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406 (1966); Special Emergency Radio Service, 24 F.C.C. 2d 310 (1970); and Multiple License -- Safety and Special Radio Services, 24 F.C.C. 2d 510 (1970).

Transport Intervenor Br., p.10). We believe that the above is a novel argument, but it is one that is overcome by further consideration of the Court's opinion therein, the subsequent holding of the Court in NARUC v. FCC, 533 F2d 601 (D.C. Cir. 1976), and the existing case law.

Intervenor American Trucking Associations, on the other hand, claims that under the holding of the NARUC case, 525 F2d 630, that the Commission will have to determine whether entities are common carriers as they appear, since it is incorrect to hold, as some entities did, that non-profit sharing is common carriage per se. (American Trucking Intervenor Br., pp. 34 - 35). Insofar as the American Trucking argument is concerned, we submit that there is a "per se" definition of what constitutes common carriage; namely, a holding out to the public to carry for hire indifferently. The existence or non-existence of profit is immaterial as to whether or not that definition should be applied to an entity or to a determination as to whether an entity is engaged in common carriage. Once it is determined that an entity makes a charge (i.e., for hire) for a communications service that he provides and that he provides the service to others, the only remaining question is whether such was done pursuant to a holding out to serve indifferently. Consequently, United does not contend that entities engaging in sharing arrangements who seek to make a profit from sharing arrangements are

per se common carriers. What we do contend is that it was legal error for the Commission to declare that entities engaging in sharing arrangements who did not seek to make a profit were per se not engaged in common carriage.

II.

The FCC has no discretion whether to regulate or not to regulate sharing arrangements.

In its Brief, the FCC maintains that since resellers are common carriers that the FCC has no discretion to regulate or not to regulate them pursuant to Title II of the Act. (FCC Br., pp. 49 - 50). The only discretion the Commission does have with respect to resellers, as pointed out in the FCC's Brief, is in choosing how to regulate them -- i.e., whether to subject them to the full ambit of Title II of the Act. (FCC Br., pp. 50 - 51). However, with regard to sharing arrangements, the FCC contends that it has even greater discretion and that it is entitled to "...leeway in choosing 'which regulatory tools will be the most effective in advancing the Congressional objective.' Philadelphia Television Broadcasting Co., 359 F2d at 284." (FCC Br., p. 52).

Insofar as the FCC's statements concerning its lack of discretion to regulate entities (resellers) found to be common carriers, we are in complete agreement. We part company with the FCC when we reach the "even greater discretion over sharing arrangements" argument. First of all, we believe that application of the correct test of common carriage -- an undertaking to carry for hire all people indifferently and that customers

transmit intelligence of their own design and choosing -- to entities engaging in sharing arrangements indicates that such entities meet the requisite criterion. Also, examination of the Commission's Orders establishes, we believe, that entities permitted to engage in sharing arrangements and resellers are both the same absent profit. 60 F.C.C. 2d 261, 265 - 266, 271 - 276, 298, 303, 316 - 321 (1976) (J.A. pp. 33 - 35, 41 - 49, 77 - 78, 83 - 85, 101 - 109). Thus, the Commission's discretion with regard to the regulation of sharing arrangements as permitted is no greater than its discretion over resellers.

Secondly, the jurisdiction that the FCC has over common carriers under Title II is not ancillary jurisdiction ^{2/} (FCC Br., p. 52), but direct jurisdiction. Consequently, any jurisdiction that the FCC might impose under Title II on erring sharing arrangements (those that seek to make a profit) cannot be characterized as "ancillary." Title II jurisdiction is direct jurisdiction. Moreover, the FCC's and other parties' reliance on the applicability of the holding in the Philadelphia Television Broadcasting Co. case to the instant situation is misplaced. (FCC Br., p. 52, SIAC Intervenor Br., p. 19; Arinc-Air Transport Intervenor Br., pp. 7 - 8). In the Philadelphia Television Broadcasting Co. case, the Court held that in light of the fact that

^{2/} The Commission's jurisdiction over CATV has been held to be ancillary jurisdiction; that is to say, its jurisdiction is restricted to that reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

CATV did not exist at the time the Communications Act was passed, that the FCC's interpretation of the Act was entitled to great deference. Thus, it upheld the FCC's decision to regulate CATV systems as adjuncts of the Nation's broadcasting system as being a "rationale and hence permissible choice." 359 F2d 282, 284 (D.C.Cir. 1966). Insofar as the instant situation is concerned, neither the Act nor the Commission's own Rules is silent as to what is a common carrier; i.e., 47 U.S.C. § 153 (h) and 47 C.F.R. § 21.2 (1976). Also, "the common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities." NARUC v. FCC, 525 F2d 630, 644 (D.C.Cir. 1976). Hence, under the Act, one is either a common carrier or one is not. If an entity meets the test for a common carrier, the Commission must regulate the entity pursuant to Title II of the Communications Act. Its jurisdiction over common carriers is not conferred by reference to other portions of the Act as is the case with respect to CATV.

Finally, the Commission need not worry which "regulatory tools" will be most effective vis à vis sharing arrangements in advancing the Congressional objective (FCC Br., p. 52), because, if, as it argues, sharing arrangements are not involved in common carriage, it has no jurisdiction to begin with over them since they are neither licensees subject to Title III of the Act nor common carriers subject to Title II.

CONCLUSION

For the reasons set forth in Petitioner's Brief and Reply Brief, that portion of the Commission's Orders here under review respecting its policy not to regulate entities engaging in sharing arrangements as common carriers should be set aside.

Respectfully submitted,

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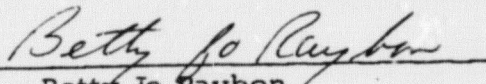
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